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Calif. 678 ; *Bailey v. The State*, 26 Ind. 422 ; *The State v. Schingen*, 20 Wisc. 74.

Not that intoxication is ever an excuse for crime, but only as a circumstance tending to show that the particular crime charged had never been committed ; not that the fact of intoxication ever, as a

matter of law, positively disproves capacity to commit the act alleged, but only that it is admissible for the consideration of the jury. See *State v. Avery*, 44 N. H. 392. E. H. B.

Supreme Court of Illinois.

CHICAGO AND NORTH-WESTERN RAILWAY COMPANY v. THE PEOPLE EX REL. HEMPSTEAD.

A railroad company, like any other common carrier, must serve all persons alike so far as equally within its power. It is the duty of such company, therefore, to deliver grain in bulk in the regular course of business to any elevator along its line, as directed in the consignment. It is no excuse that the company has made contracts with the owners of certain elevators to deliver exclusively to them.

But a railroad company cannot be made to deliver beyond its own line, even though there is a connecting track between its terminus and the place of consignment, over which it has a right to run its cars on payment of certain track fees.

THIS was an application to the Superior Court of Chicago for a *mandamus* on the relation of the owners of the Illinois River Elevator, a grain warehouse in the city of Chicago, to compel the railway company to deliver to said elevator grain in bulk consigned to it upon the line of its road. There was a return duly made to the alternative writ, a demurrer to the return, and judgment *pro forma* upon the demurrer, directing the issuing of a peremptory writ. From that judgment the railway company appealed to this court. The facts, as presented by the record, were as follows :—

The company has freight and passenger depots on the west side of the North branch of the Chicago river, north of Kinzie street, for the use of the divisions known as the Wisconsin and Milwaukee divisions of the road, running in a north-westerly direction. It also has depots on the east side of the North branch, for the use of the Galena division, running west. It has also a depot on the South branch, near Sixteenth street, which it reaches by a track diverging from the Galena line on the west side of the city.

Under an ordinance of the city, passed August 10th 1858, the Pittsburgh, Fort Wayne and Chicago company, and the Chicago, St. Paul and Fond du Lac company (now merged in the Chicago and North Western company), constructed a track on West Water street, from Van Buren street north to Kinzie street, for the purpose of forming a connection between the two roads. The Pittsburgh, Fort Wayne and Chicago company laid the track from Van Buren to Randolph street, and the Chicago and St. Paul and Fond du Lac company that portion of the track from Randolph north to its own depot. The different portions of the

track were, however, constructed by these two companies by an arrangement between themselves, the precise character of which did not appear, but it was to be inferred from the record that they had a common right to the use of the track from Van Buren street to Kinzie, and did in fact use it in common. The elevator of the relators is situated south of Randolph street and north of Van Buren, and is connected with the main track by a side track laid by the Pittsburgh company at the request and expense of the owners of the elevator, and connected at each end with the main track. The other facts appear in the opinion.

LAWRENCE, C. J.—Since the 10th of August 1866, the Chicago and North Western company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators known as the Galena, North Western, Munn & Scott, Union, City, Munger & Armour, and Wheeler, has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company adopted in 1864, forbidding the carriage of grain in bulk if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

The situation of these elevators to which alone the company will deliver grain is as follows: The North Western is situated near the depot of the Wisconsin division of the road, north of Kinzie street; the Munn & Scott, on West Water street, between the elevator of relators and Kinzie street; the Union and City, near Sixteenth street, and approached only by the track diverging from the Galena division on the west side of the city already mentioned, and the others are on the west side of the North branch of the Chicago river. The Munn & Scott elevator can be reached only by the line laid on West Water street, under the city ordinance already mentioned, and the elevator of relators is reached in the same way, being about four and one-half blocks further south. The line of the Galena division of the road crosses the line on West Water street at nearly a right angle, and then recrosses the North branch on a bridge. It appears by the return to the writ that a car coming into Chicago on the Galena division, in order to reach the elevator of relators, would have to be taken by a drawbridge across the river on a single track, over which the great mass of the business of the Galena division is done, then backed across the river again upon what is known as the Milwaukee division of respondent's road, thence taken to the track on West Water street, and the cars when unloaded could only be taken back to the Galena division by a similar but reversed process, thus necessitating the passage of the drawbridge with only a single line four times, and, as averred in the return, subjecting the company to great loss of time and pecuniary damage in the delay that would be caused to its regular trains and business on that division.

This seems so apparent that it cannot be fairly claimed the elevator of relators is upon the line of the Galena division in any such sense as to make it obligatory upon the company to deliver upon West Water street freight coming over that division of the road. The doctrine of the Vincent case in 49 Ills., was that a railway company must deliver

grain to any elevator which it had allowed by a switch to be connected with its own line. This rule has been reaffirmed in an opinion filed at the present term in the case of *The People ex rel. Hempstead v. The Chicago and Alton Railroad Company*, but in the last case we have also held that a railway company cannot be compelled to deliver beyond its own line simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line by use.

So far as we can judge by this record and the maps showing the railway lines and connections filed as a part thereof, the Wisconsin and Milwaukee divisions running north-west, and the Galena division running west, though belonging to the same corporation and having a common name, are for the purposes of transportation substantially different roads, constructed under different charters, and the track on West Water street seems to have been laid for the convenience of the Wisconsin and Milwaukee divisions. It would be a harsh and unreasonable application of the rule announced in the *Vincent Case*, and a great extension of the rule beyond anything said in that case, if we were to hold that these relators could compel the company to deliver at their elevator grain which has been transported over the Galena division, merely because the delivery is physically possible, though causing great expense to the company and a great derangement of its general business, and though the track on West Water street is not used by the company in connection with the business of the Galena division. What we have said disposes of the case so far as relates to the delivery of grain coming over the Galena division of respondent's road. As to such grain, the *mandamus* should not have been awarded.

When, however, we examine the record as to the connection between the relator's elevator and the Wisconsin and Milwaukee divisions of respondent's road, we find a very different state of facts. The track on West Water street is a direct continuation of the line of the Wisconsin and Milwaukee divisions. Cars coming on this track from these divisions do not cross the river. The Munn & Scott elevator, to which the respondents deliver grain, is, as already stated, upon a side track connected with this track. The respondent not only uses this track to deliver grain to the Munn & Scott elevator, but it also delivers lumber and other freight upon this track, thus making it not only legally, but actually, by positive occupation, a part of its road. The respondent in its return admits in explicit terms that it has an equal interest with the Pittsburgh, Fort Wayne and Chicago Railroad in the track laid on West Water street. It also admits its use, and the only allegation made in the return for the purpose of showing any difficulty in delivering to relator's elevator the grain consigned thereto from the Wisconsin and Milwaukee divisions is, that those divisions connect with the line on West Water street only by a single track, and that respondent cannot deliver bulk grain or other freight to the elevator of relators even from those divisions without large additional expense, caused by the loss of the use of motive power, labor of servants, and loss of use of cars while the same are being delivered and unloaded at said elevator and brought back. As a reason for non-delivery on the grounds of difficulty, this is simply frivolous. The expense caused by the loss of the use of motive power, labor, and cars while they are being taken to their place of des-

tion and unloaded, is precisely the expense for which the company is paid its freight. It has constructed this line on West Water street in order to do the very work which it now in general terms pronounces a source of large additional expense, yet it does not find the alleged additional expense an obstacle in the way of delivering grain upon this track at the warehouse of Munn & Scott, or delivering other freights to other persons than the relators. Indeed, it seems evident from the diagrams attached to the record that three of the elevators to which the respondent delivers grain are more difficult of access than that of the relators, and three of the others have no appreciable advantage in that respect, if not placed at a decided disadvantage by the fact that they can be reached only by crossing the river.

We presume from the argument that the respondent's counsel place no reliance upon this allegation of additional expense so far as the Wisconsin and Milwaukee divisions are concerned. They rest the defence on the contracts made between the company and the elevators above named for exclusive delivery to the latter to the extent of their capacity. This brings us to the most important question in the case. Is a contract of this character a valid excuse to the company for refusing to deliver grain to an elevator upon its lines and not a party to the contract to which such grain has been consigned? In the oral argument of their case, it was claimed, by counsel for the respondent, that a railway company was a mere private corporation, and that it was the right and duty of its directors to conduct its business merely with reference to the pecuniary interests of the stockholders. The printed arguments do not go to this extent in terms, but they are colored throughout by the same idea, and in one of them we find counsel applying to the Supreme Court of the United States and the Supreme Court of Pennsylvania language of severe and almost contemptuous disparagement, because those tribunals have said that "a common carrier is in the exercise of a sort of public office." (*New Jersey Steam Navigation Company v. Merchants' Bank*, 6 How. 381; *Sanford v. Railroad Co.*, 24 Penn. 380.) If the language is not critically accurate, perhaps we can pardon those courts when we find that substantially the same language was used by Lord HOLT in *Coggs v. Bernard*, 2 Lord Raymond 909—the leading case in all our books on the subject of bailments. The language of that case is, that the common carrier "exercises a public employment."

We shall engage in no discussion in regard to names. It is immaterial whether or not these corporations can be properly said to be in the exercise of a "sort of public office," or whether they are to be styled private or *quasi* public corporations. Certain it is that they owe some important duties to the public, and it only concerns us now to ascertain the extent of those duties, as regards the case made upon this record.

It is admitted by respondent's counsel that railway companies are common carriers, though even that admission is somewhat grudgingly made. Regarded merely as a common carrier at common law, and independently of any obligations imposed by the acceptance of its charters, it would owe important duties to the public, from which it could not release itself, except with the consent of every person who might call upon it to perform them. Among these duties, as well defined and settled as anything in the law, was the obligation to receive and carry

goods for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. These obligations grew out of the relation voluntarily assumed by the carrier toward the public, and the requirements of public policy, and so important have they been deemed that eminent judges have often expressed their regret that common carriers have ever been permitted to vary their common-law liability, even by a special contract with the owner of the goods.

Regarded then merely as a common carrier at common law, the respondent should not be permitted to say it will deliver goods at the warehouse of A. and B., but will not deliver at the warehouse of C., the latter presenting equal facilities for the discharge of freight, and being accessible on respondent's line.

But railway companies may well be regarded as under a higher obligation, if that were possible, than that imposed by the common law to discharge their duties to the public as common carriers fairly and impartially. As has been said by other courts, the state has endowed them with something of its own sovereignty in giving them the right of eminent domain. By virtue of this power, they take the lands of the citizen, against his will, and can, if need be, demolish his house. Is it supposed these great powers were granted merely for the private gain of the corporators?

On the contrary, we all know the companies were created for the public good. The object of the legislature was to add to the means of travel and commerce. If, then, a common carrier at common law came under obligation to the public, from which he could not discharge himself at his own volition, still less should a railway company be permitted to do so, when it was created for the public benefit and has received from the public such extraordinary privileges. Railway charters not only give a perpetual existence and great power, but they have been constantly recognised by the courts of this country as contracts between the companies and the state imposing reciprocal obligations.

The courts have always been, and we trust always will be, ready to protect these companies in their chartered rights, but on the other hand we should be equally ready to insist that they perform faithfully to the public those duties which were the object of their chartered powers.

We are not of course to be understood as saying or intimating that the legislature or the courts may require from a railway company the performance of any and all acts that might redound to the public benefit, without reference to the pecuniary welfare of the company itself. We hold simply that it must perform all those duties of a common carrier to which it knew it would be liable when it sought and obtained its charter, and the fact that the public has bestowed upon it extraordinary powers is but an additional reason for holding it to a complete performance of its obligation.

The duty sought to be enforced in this proceeding is the delivery of grain in bulk to the warehouse to which it is consigned, such warehouse being on the line of the respondents' road, with facilities for its delivery equal to those of other warehouses at which the company does deliver, and the carriage of grain in bulk being a part of its regular business. This then is the precise question decided in the *Vincent Case* in 49th Ill., and it is unnecessary to repeat what was then said. We may remark,

however, that as the argument of counsel necessarily brought that case under review, and as it was decided before the reorganization of the court under the new constitution, the court as now constituted has re-examined that decision, and fully concur therein. That case is really decisive of the present so far as respects grain transported on the Wisconsin and Milwaukee divisions of respondents' road. The only difference between this and the *Vincent Case* is in the existence of the contract for exclusive delivery to the favored warehouses, and this contract can have no effect, when set up against a person not a party to it, as an excuse for not performing toward such person those duties of a common carrier prescribed by the common law and declared by the statute of the state.

The contract in question is peculiarly objectionable in its character, and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the state might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the state almost wholly to their control as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone, and thus give to the owner of such elevator an absolute and complete monopoly in the handling of all the grain that might be transported on such road. So, too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming their existence under a perpetual charter from the state, and by the sacredness of such charter claiming to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed and managed by unscrupulous hands.

Can it be seriously doubted whether a contract involving such a principle and such results is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouse the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively at its chosen warehouse is a deliberate policy, to be followed for a term of years during which these contracts run.

It is, however, urged very strenuously by counsel for the respondent that a common carrier, in the absence of contract, is bound to carry and deliver only according to the custom and usage of his business; that it depends upon himself to establish such custom and usage, and that the respondent never having held itself out as a carrier of grain in bulk, except upon condition that it may itself choose the consignee, this has become the custom and usage of its business, and it cannot be required to go beyond this limit. In answer to this position, the fact that the respondent has derived its life and powers from the people, through the

legislature, comes in with controlling force. Admit, if the respondent were a private association which had established a line of wagons for the purpose of carrying grain from the Wisconsin boundary to the elevator of Munn & Scott, in Chicago, and had never offered to carry or deliver it elsewhere, that it could not be compelled to depart from the custom or usage of its trade, still the admission does not aid the respondent in this case. In the case supposed, the carrier would establish the terminal points of his route at his own discretion, and could change them as his interests might demand. He offers himself to the public as a common carrier to that extent, and he can abandon his first line and adopt another at his own volition. If he should abandon it, and instead of offering to carry grain only to the elevator of Munn & Scott, should offer to carry it generally to Chicago, then he would clearly be obliged to deliver it to any consignee in Chicago to whom it might be sent, and to whom it could be delivered, the place of delivery being upon his line of carriage.

In the case before us, admitting the position of counsel that a common carrier establishes his own line and terminal points, the question arises, At what time and how does a railway company establish them? We answer, when it accepts from the legislature the charter which gives it life, and by virtue of such acceptance. That is the point of time at which its obligations begin. It is then that it holds itself out to the world as a common carrier whose business will begin as soon as the road is constructed upon the line which the charter has fixed.

Suppose this respondent had asked from the legislature a charter authorizing it to carry grain in bulk to be delivered only at the elevator of Munn & Scott, and nowhere else in the city of Chicago. Can any one suppose such a charter would have been granted? The supposition is preposterous. But instead of a charter making a particular elevator the terminus and place of delivery, the legislator granted one which made the city of Chicago itself the terminus, and, when this charter was accepted, then at once arose on the part of the respondent the corresponding obligation to deliver grain at any point within the city of Chicago upon its lines, with suitable accommodations for receiving it, to which such grain might be consigned. Perhaps grain in bulk was not then carried in cars, and elevators may not have been largely introduced. But the charter was granted to promote the conveniences of commerce, and it is the constant duty of the respondent to adopt its agencies to that end. When these elevators were erected in Chicago, to which the respondent's line extended, it could only carry out the obligations of its charter by receiving and delivering to each elevator whatever grain might be consigned to it, and it is idle to say such obligation can be evaded by the claim that such delivery has not been the custom or usage of respondent. It can be permitted to establish no custom inconsistent with the spirit and object of its charter.

It is claimed by counsel that the charter of respondent authorizes it to make such contracts and regulations as might be necessary in the transaction of its business. But certainly we cannot suppose the legislature intended to authorize the making of such rules or contracts as would defeat the very object it had in view in granting the charter. The company can make such rules and contracts as it pleases not inconsistent with its duties as a common carrier, but it can go no further,

and any general language which its charter may contain must necessarily be construed with that limitation. In the case of the *City of Chicago v. Rump*, 45 Ill. 94, this court held a clause in the charter giving the common council the right to control and regulate the business of slaughtering animals did not authorize the city to create a monopoly of the business under pretence of regulating and controlling it.

It is unnecessary to speak particularly of the rule adopted by the company in reference to the transportation of grain. What we have said in regard to the contract applies equally to the rule.

The principle that a railway company can make no injurious or arbitrary discrimination between individuals, in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases. In England, a contract which admitted to the door of a station within the yard of a railroad company a certain omnibus, and excluded another omnibus, was held void: *Marriott v. L. and S. Railroad Co.*, 1 C. B. N. S. 499 (87 E. C. L. 498).

In *Garton v. The Bristol and Exeter Railroad Company*, 6 C. B. N. S. 639 (95 E. C. L. 641), it was held that a contract with certain ironmongers to carry their freight for a less price than that charged the public was illegal, no good reason for the discrimination being shown.

In *Crouch v. The London and Northwestern Railroad Company*, 14 C. B. N. S. (78 E. C. L. 254), it was held a railway company could not make a regulation for the conveyance of goods which in practice affected one individual only.

In *Sanford v. Railroad*, 24 Penn. 382, the court held that the power given in the charter of a railway company to regulate the transportation of the road did not give the right to grant exclusive privileges to a particular express company. The court say: "If the company possessed this power it might build up one set of men and destroy others; advance one kind of business and break down another, and make even religion and politics the tests in the distribution of its favors. The rights of the people are not subject to any such corporate control."

We refer, also, to the *Rogers Locomotive Works v. Erie Railroad Company*, 5 C. E. Green 380, and *State v. Hartford and New Haven Railway Company*, 29 Conn. 538.

It is insisted by counsel for the respondent that, even if the relator has just cause of complaint, he cannot resort to the writ of *mandamus*. We are of opinion, however, that he can have an adequate remedy in no other way, and that the writ will therefore lie.

The judgment of the court below in awarding a peremptory *mandamus* must be reversed, because it applies to the Galena division of the respondent's road as well as the Wisconsin and Milwaukee divisions. If it had applied only to the latter, we should have affirmed the judgment. The parties have stipulated that, in case of reversal, the case shall be remanded, with leave to the relator to traverse the return. We therefore make no final order, but remand the case, with leave to both parties to amend their pleadings if desired, in view of what has been said in this opinion.

Reversed and remanded.

We have hesitated about publishing its great length and the very limited the foregoing opinion, on account of interest in the particular questions deci-

ded. But our own conviction of the importance of the principle involved has finally overcome that reluctance. It has long seemed to us, that unless the railways can be held to that impartiality and fairness in the performance of their public duty, in the transportation of freight, the business of the country will finally be thrown into inextricable confusion. Competition, we know, may be carried to such an extreme, as for a time at least, to produce great perplexity; but that is one of the unavoidable evils connected with the case of otherwise unendurable monopoly. The selfishness and want of principle in man is such, that he will adopt any course which promises the greatest advantage to his own business, altogether regardless of consequences to others. The only salutary and reliable check upon this overmastering tyranny is to be found in free competition. So long as competition is open to all, upon equal terms, there is no serious danger of any great oppression in the conduct of business. But the only mode in which this can be maintained, in a country dependent upon railway transportation, is to compel the railway to exercise absolute impartiality towards all who desire accommodation. Unless this rule is rigidly enforced in spite of all subterfuges and evasions, there will be no security. We shall all be placed at the mercy of the most enterprising and the most reckless. It is easy for such men to bind the railway companies to such terms of transportation, as shall absolutely silence all possible competition. It is not that any one desires competition to be carried to any destructive extent. There is no danger of this, and will be no necessity for it, so long as the field is kept open to all. Shrewd men will do business upon fair terms, so long as they remain exposed at every moment to the introduction of a rival

establishment. But the moment all such restraint is removed, the best of men will be in great danger, unconsciously, of trespassing upon the rights of others.

We know that in England these questions are, at the present time, ruled almost exclusively by statutory enactments. And some of the English judges seem to suppose, that independently of statutory provisions, it might not be in the power of the courts to compel railway companies to serve all who employ them, upon the same terms; and to serve all who applied, without discrimination as to time or terms, to the extent of their means. But this doubt, we suppose, must rest more upon the remedy than the right. We understand, that by the common law of England common carriers are bound to carry for all who desire to employ them, and upon reasonable terms. This may not absolutely imply that they shall carry for all upon precisely the same terms. For common carriers may sometimes choose, for a short period and to accomplish a particular result, to carry for much less than a fair and reasonable compensation. But unless there is some exceptional case, we must conclude that the price must be the same to all for equal service. Any other rule upon railways would become absolutely intolerable. But in England, we believe, the remedy by *mandamus* has never been applied to this class of cases, or if so, not except under very exceptional circumstances. But we cannot but admire the resolute determination manifested in the foregoing cases to apply such a remedy as will effectually cure the evil, which, it must be confessed, an action at common law does but imperfectly, and which a *mandamus* does meet effectually.

I. F. R.